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No. 86-2050

In the Supreme Court of the United States

OCTOBER TERM, 1987

**CARLYN M. JOHNSON AND CAROL J. JOHNSON,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

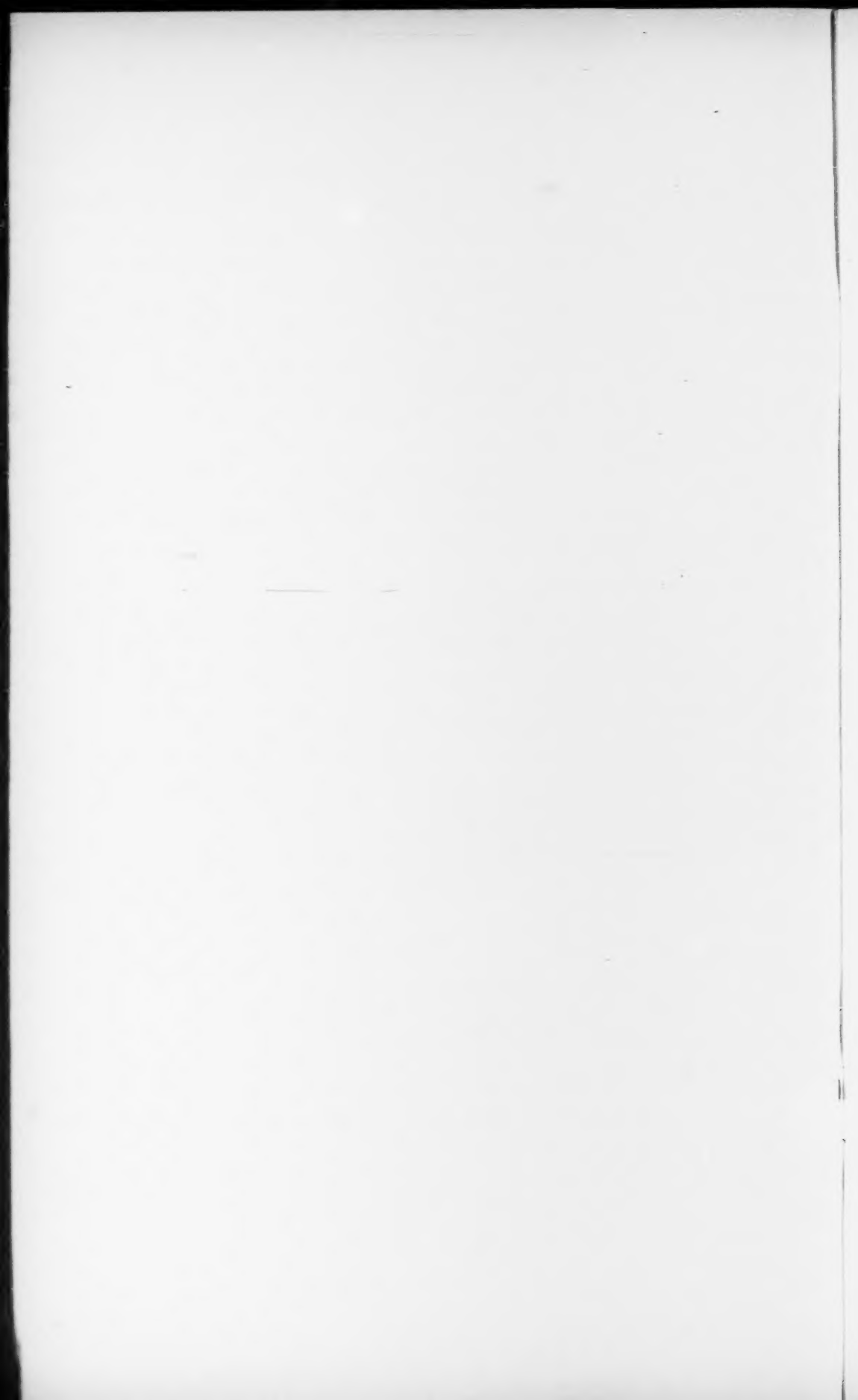
**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

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Petitioners seek review of the court of appeals' decision sua sponte dismissing their appeal without prejudice on grounds of lack of jurisdiction because the Tax Court had not yet entered a final decision disposing of all tax years pending before it.

1. After audit, the Commissioner determined a deficiency in petitioners' 1982 federal income taxes and issued a notice of deficiency to that effect under Section 6212 of the Internal Revenue Code.¹ Peti-

¹ Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

tioners thereafter filed a Tax Court petition in which they sought redetermination of their tax liabilities for that year, and, in addition, sought a redetermination of their tax liabilities for 1979, 1980, 1981, and 1983. Because no notices of deficiency for any of the years 1979, 1980, 1981, or 1983 had been issued to petitioners within the 90-day period preceding the filing of their Tax Court petition,² the Tax Court dismissed the petition, for lack of jurisdiction, as to all years other than 1982. The court subsequently denied a motion filed by petitioners, which the court construed as a motion to vacate its order of dismissal. Pet. App. 25-26; see I.R.C. § 6213(a).

Petitioners thereupon took an appeal from the dismissal of their petition for the years 1979, 1980, 1981, and 1983. Their petition seeking redetermination of the deficiency asserted for 1982, however, was still before the Tax Court, where it remains pending. On March 23, 1987, the court of appeals *sua sponte* dismissed the appeal without prejudice, on the ground that the court lacked appellate jurisdiction in the absence of a final decision disposing of all tax years pending before the Tax Court. On April 10, 1987, the court denied petitioners' request for reconsideration (Pet. App. 22).

² The petition was filed on May 19, 1986. A notice of deficiency for petitioners' 1981 tax year had been issued on July 21, 1983, but no Tax Court petition was filed within 90 days of that date. A notice of deficiency for petitioners' 1983 tax year was issued on September 3, 1986, more than three months *after* the instant petition was filed. Section 6213(a), however, requires as a jurisdictional prerequisite that a notice of deficiency *precede* the filing of a Tax Court petition seeking redetermination of a taxpayer's liability for a particular year.

On May 11, 1987, the court issued a per curiam opinion³ to address the Commissioner's contention, advanced in his response to petitioners' request for reconsideration, that the court of appeals did have appellate jurisdiction under Section 7482(a)(1) of the Code.⁴ The court explained that it agreed with the Second Circuit's decision in *Estate of Yaeger v. Commissioner*, 801 F.2d 96 (1986), which held that the statutory language authorizing appellate review of Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury" (I.R.C. § 7482(a)(1)) did not permit a "bifurcated appeal" from the Tax Court. Rather, the court held, petitioners' appeal concerning their 1979, 1980, 1981 and 1983 tax years would have to wait until the Tax Court reached a final decision on petitioners' tax liability for 1982.

³ We are lodging with the Court copies of the March 23 order and the May 11 opinion of the court of appeals, which were not reprinted in the appendix to the petition.

⁴ The Tax Reform Act of 1986 redesignated what was formerly Section 7482(a) of the Code as Section 7482(a)(1) without changing the terms of the statute. That statute provides in full:

Jurisdiction

The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

2. The courts of appeals are divided on the question whether an order dismissing a Tax Court petition as to fewer than all the years before it is immediately appealable. In *Wilson v. Commissioner*, 564 F.2d 1317 (1977), cert. denied, 439 U.S. 832 (1978), the Ninth Circuit exercised jurisdiction over an appeal from the Tax Court's denial of a motion to amend a pending petition to encompass an additional tax year. The Ninth Circuit reasoned that the order had the effect of a final decision dismissing the petition as to the additional year, which the court concluded would be appealable. In *Estate of Yaeger v. Commissioner*, *supra*, on the other hand, the Second Circuit dismissed for lack of jurisdiction an appeal taken from a Tax Court decision that had dismissed a petition as to only one of three tax years at issue.

We believe that the Ninth Circuit's decision in *Wilson* is correct and that the decisions of the Second Circuit in *Yaeger* and of the court below are erroneous. By its terms, Section 7482(a)(1) confers jurisdiction on the courts of appeals to review "decisions" of the Tax Court. Section 7459(c) provides that "[a] decision of the Tax Court * * * shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court." It further provides that, where the Tax Court dismisses a proceeding, "an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry." If not appealed within the 90-day period specified by Section 7483, such "decisions" become final under Section 7481(a)(1). Any deficiency may then be assessed pursuant to Section 6215, and the decision is no longer subject to review

by any court. See, e.g., *Lasky v. Commissioner*, 235 F.2d 97 (9th Cir. 1956), aff'd, 352 U.S. 1027 (1957).

The import of this statutory framework is that a separate "decision" may be entered as to each particular year in issue. Once a "decision" is entered, we believe that it may be appealed, and, indeed, that it will become final and nonreviewable if not timely appealed.⁵ General principles of finality developed under 28 U.S.C. 1291 and Fed. R. Civ. P. 54(b), such as a preference for avoiding bifurcated appeals, simply have not been incorporated into the statutory provisions dealing with appealability of Tax Court decisions.

The language of Section 7482(a)(1) relied upon the court below—providing that Tax Court decisions are to be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"—was in no way intended to incorporate into that statute the jurisdictional limitations of 28 U.S.C. (& Supp. III) 1291 and 1292 or the related provisions of Fed. R. Civ. P. 54(b). This language was added to the predecessor

⁵ It is, of course, well settled that a dispute as to tax liability constitutes a "separate cause of action" for each year. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Thus, even in an income tax refund suit in district court, a judgment covering one or more, but fewer than all, of the years in issue would appear to be appealable under 28 U.S.C. 1291, subject to the district court's certification that "there is no just reason for delay." See Fed. R. Civ. P. 54(b). The only significant difference in the procedures applicable in the Tax Court, we submit, is that appealability of a Tax Court "decision" covering fewer than all years involved would not depend upon a certification that there is no reason for delay.

of Section 7482 in 1948. Act of June 25, 1948, ch. 646, § 36, 62 Stat. 991. Its purpose was to overturn this Court's decision in *Dobson v. Commissioner*, 320 U.S. 489 (1943), which had established a special and highly deferential scope of appellate review of Tax Court decisions. The language in question simply means that the "clearly erroneous" standard of review applies to appeals from the Tax Court, just as it applies to appeals from the district courts. See S. Rep. 1559, 80th Cong., 2d Sess. 2, 13 (1948); *Commissioner v. Duberstein*, 363 U.S. 278, 291 n.13 (1960); *Commissioner v. Smith Paper, Inc.*, 222 F.2d 126, 128 (1st Cir. 1955).

3. We do not believe it necessary for the Court to resolve this circuit conflict in this case. Notwithstanding our view as to the incorrectness of the decision below, petitioners here will sustain no harm as a result of the court of appeals' dismissal, without prejudice, of their appeal. Once the Tax Court enters a decision redetermining petitioners' deficiency in taxes for 1982, they will be free to take an appeal to the Eighth Circuit from the Tax Court's decisions as to 1979, 1980, 1981, and 1983 as well, thereby bringing all their claims before the court of appeals in a single appeal. Indeed, petitioners do not appear to complain in their petition about the jurisdictional ruling of the court of appeals; rather, the petition appears to focus on petitioners' contentions on the underlying merits, which the court of appeals explicitly did not address (slip op. 3), and which would not, in any event, be properly before this Court were it to grant the petition.⁶ If the circuit conflict to

⁶ We note that there appears to be no serious question as to the correctness of the Tax Court's order dismissing the petition as to years other than 1982. It is well settled that

which we have referred should persist, and if the question presented arises in a future case where the rights of one of the parties are actually prejudiced by the decision, the Court can consider at that time whether the question is sufficiently important to warrant certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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the Tax Court has jurisdiction to redetermine deficiencies only in cases in which the Commissioner has issued a notice of deficiency and the taxpayer thereafter has filed a timely petition with respect to the deficiency so determined. See I.R.C. §§ 6212(a), 6213(a), and 6214(a); *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420 (1943). Petitioners' contentions concerning their 1979, 1980, 1981, and 1983 tax years can still be raised in a Tax Court proceeding timely initiated after the issuance of a notice of deficiency, if any, or in a timely refund suit instituted in the Claims Court or a federal district court, after payment of the assessed taxes and compliance with the refund claim requirements of Section 7422(a) of the Code.